Supreme Court of the United States

October Term, 1906.

CHARLES BOWN AND LEANDER L. ORMSBY, *Plaintiffs in Error,*
vs.
ENOS C. WALLING. } No. 81.

ORLANDO F. BACON, *Plaintiff in Error,*
vs.
PAUL H. WALKER, CHARLES G. WALKER, EUGENE WALKER, AND GILBERT WALKER. } No. 147.

In Error to the Supreme Court of the State of Idaho.

Brief for Plaintiffs in Error.

STATEMENT.

Case No. 81, having been postponed to be considered with No. 147, as one case, we will consider them together.

Both cases are based upon the following Statute of Idaho:

"Section 1210. It is not lawful for any person owning or having charge of the sheep to herd the same, or

> permit them to be herded on the land or possessory claim of other persons, or to herd the same or permit them to graze within two miles of the dwelling house of the owner or owners of said possessory claim.
>
> "Section 1211. The owner or agent of such owner of sheep violating the provisions of the last section, on complaint of the party or parties injured before any justice of the peace for the precinct where either of the interested parties may reside, is liable to the party injured for all damages sustained; and if the trespass be repeated, is liable to the party injured for the second and every subsequent offense in double the amount of damages sustained."

Both cases originated in the Courts of Justices of the Peace and were appealed to the District Court and finally to the Supreme Court of the State, where both were decided against the plaintiffs in error and were brought to this court on writs of error to that court.

The constitutionality of the act was properly raised in both cases and that is the only question involved in the cases here.

The statute was enacted in 1875, but no effort was made to enforce it until 1901. It was sustained by the Supreme Court (Judge Stockslager dissenting) as a proper exercise of the Police Power. This, then, is the real question involved, to the discussion of which we will now address ourselves.

ARGUMENT.

Police Power.

Black on Constitutional Law, p. 334, thus defines Police Power:

> "There is in every sovereignty an inherent and plenary power to make all such laws as may be necessary and proper to preserve the public security, order, health, morality and justice. This power is called the Police Power."

This general definition seems to be broad and sweeping and yet courts have found great difficulty in giving it anything but a general definition. As was said by Mr. Justice Miller in the Slaughterhouse Cases (16 Wall., 32), "This power is and must be from its very nature incapable of any very exact definition or limitation." Nevertheless, most of the duty of the courts in connection with this power has been performed in efforts to keep its exercise within reasonable limits. It will be conceded, we think, that the tendency in legislative bodies called upon to exercise powers unlimited, except by their own judgment of what is best for the general welfare, is, to go to unreasonable and sometimes arbitrary lenghts in its exercise. It is, in such cases, the duty of the courts to step in and prevent such an exercise of this, when properly exercised, very beneficent and necessary power.

The courts were slow to interfere where the legislature of a *state* passed laws which it considered fell within this power and which were deemed by it best for the "public security, order, health or morals" of its people, for the reason as it was argued "the legislature acts upon its constituents," which was considered a sufficient safeguard against unreasonable or arbitrary acts. But while slow to reach the point of placing limits upon the unreasonable, or arbitrary exercise of this power, it is now well settled that it will be exercised in all proper cases.

Freund in his work on Police Power, at p. 139, after referring to and quoting from the decision of Matter of Jacobs (98 N. Y., 98), wherein the court declared an act of the legislature prohibiting the manufacture of cigars or other preparations of tobacco on any floor of a tenement house used for the purpose of living, sleeping, cooking, or doing household work, therein, which was entitled an "act to improve the public health," says:

> "Assuming the sanitary object to have been colorable, there was no valid ground to support the act, and *the chief interest of the case* must be found in the fact that the *Court undertook to override the legislative judgment*, which conceivably might have been based upon sufficient evidence."

In the case Gulf Col. & S. F. Ry. Co. vs. Ellis, 165 U. S., 150, Mr. Justice Brewer speaking for the court upon this point said:

> "When we consider the nature and theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power. No duty rests more imperatively upon courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of their government."

In Lawton vs. Steele, 15 U. S., 133, this Court, Mr. Justice Brown delivering the opinion, it is said:

> "The legislature may not, under the guise of protecting public interest, arbitrarily interfere with public business or impose unusual and unnecessary restrictions upon lawful occupations. In other words, its *determination as to what is a proper exercise, of its Police Power is not final or conclusive*, but is subject to the supervision of *the courts*.

Limitation of Police Power.

Having seen that the courts will interfere in a proper case, the next question is, in what class of cases and to what extent will the courts limit this power.

Tiedman in his work on State and Federal control of persons and property, at p. 505, thus states the doctrine:

> "The Police Power must, when exerted in any direction, be confined to the imposition of those restrictions and burdens which are necessary to promote the general welfare, in other words, to prevent the infliction of any public injury. The principle thus enunciated is the key to every problem arising out of the exercise of police power. Applied to the question of prohibition of trades or occupations it declares unwarranted by the constitution any law which prohibits altogether an occupation, the prosecution of which does not necessarily and because of its unwarranted character, work any injury to the public."

Freund on Police Power, at p. 138, states it as follows:

> "The restraint must not be disproportionate to the danger. This is simply an application of the principle that every exercise of the Police Power must be reasonable, a principle long since enforced as against municipal corporations, but also beginning to be recognized as binding on the legislature. Thus in Toledo, etc., R. Co. vs. Jacksonville (67 Ill., 37), an ordinance was set aside requiring the R. R. Co. to keep a flagman at every street crossing, even where traffic was very light."

Again at p. 482:

> "When the calling is not dangerous to the public either directly or indirectly, it can not be subjected to any police regulation whatever, which does not fall within the power of taxation."

Under the head of Classifications and Discriminations, p. 705, the same author says:

> "Under the head of particular burdens a number of cases have been discussed in which the justification of

police legislation was questioned on the ground that there was not sufficient casual connection between the right impaired and the public danger sought to be avoided. Much more frequent are the cases in which, while the connection is conceded, it is objected that the restraint is imposed upon some while others who are in a similar position are arbitrarily exempted from it. This objection involves the question of the validity of class legislation, and, in so far as it can be successfully maintained constitutes one of the most effectual limitations upon the exercise of the police power. The legislative discrimination which is thus questioned may be based on time, or locality, or personal status, and on difference of acts or occupations."

And in summing up this branch of his subject, p. 738, he says:

"Where a restraint is confined to a special class of acts or occupations, that class must present the danger dealt with in a more marked and uniform degree than the class omitted; and when the restraint is general, with certain exceptions, the excepted classes must either be entirely free from the danger, or the exception must tend to reduce the general danger, or a distinct and legitimate public policy must favor the toleration of the evil under circumstances where it is outweighed by great benefits. The decisions of the Supreme Court of the U. S. seem to be in accordance with these principles."

See in support of the same doctrine the cases of Barbier vs. Connelly, 113 U. S., 27; Connelly vs. Union Sewer Pipe Co., 184 U. S., 540; Gulf, Col. & S. F. Ry. Co. vs. Ellis *supra;* Lawton vs. Steele, *supra.*

Bearing in mind these limitations upon this power, let us consider the statute in question.

The first section makes it unlawful for any person to herd or graze sheep within two miles of the dwelling house of the owner of any possessory claim, and the second section gives the owner of such possessory claim a right of action for damages sustained, and for a second and every subsequent offense double damages.

In the case of Bown vs. Walling, No. 81, the defendant in error, plaintiff below, alleged in his complaint (Record, p. 9), that the offense complained of was committed "upon the government lands around the premises of the plaintiff."

In neither of the cases was it claimed that the plaintiff had any right, title, interest or claim of any kind whatsoever in or to any of the lands upon which the sheep were herded or grazed and for which the parties were awarded damages, but they relied solely upon the statute making it unlawful to so herd or graze sheep within two miles of the dwelling houses on their possessory claims. We thus have the question squarely presented, whether the legislature can in this manner discriminate against a long established and legitimate industry, and, in effect, except from the operation of the law all others engaged in similar industries, when it is not dangerous, or more dangerous than the excepted classes to the health, comfort or welfare of the people. Connected with this question also is that of the right of the legislature to arbitrarily give the owner of a dwelling-house on a possessory claim, the right to recover damages for herding or grazing sheep upon the lands of the United States, in which he has no claim whatever, as provided in the statute in question.

In Bedford vs. Houtz, 133 U. S., 320, Mr. Justice Miller said:

> "We are of the opinion that there is implied license growing out of the custom of nearly a hundred years

that the public lands of the United States, especially those in which the native grasses are adapted to the growth and fattening of domestic animals, shall be free to the people who seek to use them where they are left open and unenclosed, and no act of the government forbids this use. * * * The Government of the United States in all its branches has known of this use and has never forbidden it or taken any steps to arrest it. No doubt it may be safely stated that this has been done with the consent of all branches of government, and as we shall attempt to show, with its direct encouragement. * * * The owner of a piece of land who had built a house or enclosed 20 or 40 acres of it had the benefit of this universal custom as well as the party who owned no land. Everybody used the open, unenclosed common which produced nutricious grasses as a public common on which their cattle, hogs, and sheep could run and graze.

"It has never been understood that in those regions and in this country in the progress of its settlement the principle prevailed and the man was bound to keep his cattle confined within his own ground or else would be liable for their trespass upon unenclosed ground of his neighbors."

This case was cited in the case of Kelly vs. Rhoades, 188 U S., 1, the court in that case holding that Kelly in driving his sheep through Wyoming "was at liberty to consider the fact that he was licensed to make use of the public lands of the United States, without charge for the sustenance of his sheep."

The common-law rule that a man must confine his own domestic animals to his own enclosure has never obtained in Idaho.

Johnson vs. O. S. L. Ry. Co., 63, Pac. 112.

The subject naturally divides itself into three heads:

1. Is any restriction by the State of Idaho upon the herd-

ing or grazing of sheep upon one's own land, or upon the lands of the United States, reasonable?

2. If it is, is the limit of two miles fixed by the statute in question arbitrary and unreasonable, and

3. Is it an unreasonable and therefore unwarranted discrimination against the sheep industry and in effect in favor of all other similar industries.

We will take up these questions in the order above stated.

No Restriction Warranted.

We have seen that when a calling is not dangerous to the public, either directly or indirectly, it *can not be subjected to any police regulation whatever* which does not fall within the power of taxation. Freund on Police Power, *supra.*

It will hardly be contended that the herding or grazing of sheep is, of itself, dangerous to the public, either directly or indirectly. This being the case, it is difficult to see upon what ground the legislature would have the right to restrict the industry. It is an old and well established industry in many parts of the United States and particularly so in the State of Idaho, and as held by the courts, "unless it portends immediate danger, the courts will not readily acquiesce in the plea of safety to health."

Will it be said that it is offensive? If so, we answer in the language of Freund on Police Power, Section 178, that,

> "The offensiveness must as a rule consist in actual physical discomfort, or in violation of the sense of decency; mere undesirableness by reason of social or other prejudices is not sufficient, not even if it leads to a depreciation of property."

II.

The Two-Mile Limit.

But even if it were conceded (which it is not), that herding or grazing sheep in very close proximity to a house might be offensive, the next question is, whether there is any reason for the arbitrary limit of two miles. The homestead on the public lands is 160 acres, which, under the government surveys is one half mile square. It follows that, if one possessory claimant had his house on, or near the line of his claim adjoining that of his neighbor, he, the neighbor, might be prohibited under this statute from grazing his sheep on any part of his own land; for as above stated, no part of his claim would be two miles from his neighbor's house. Again, can there be any good reason urged why grazing should be permitted within the smallest fraction *over* two miles and not *within* that limit. The limit is not based upon reason, and is, therefore arbitrary, unjust and unlawful.

Tiedman on State and Federal control of persons and property, p. 556, says:

> "The nature of the business must also be such as to justify restriction as to locality. If the business is of an unoffensive character and its prosecution does not involve the creation of a nuisance, a law is unconstitutional which undertakes to confine it to a certain locality."

See also New York Sanitary Utilization Co. vs. New York City Health Department, 61, N. Y., Appl. Cited in vol. 8, C. Y. C., p. 1061.

Discrimination.

This brings us to the last question, viz, why the sheep industry was singled out from that of grazing cattle, horses, hogs or the raising of poultry?

Is this discrimination based upon any difference in these industries which would make one amenable to restrictions under the police power and not the other? Certainly the grazing of hogs is not less offensive than the grazing of sheep. Is there more danger to the public "health, comfort, security, order or morality," from the herding or grazing of sheep than of the classes of animals and fowls above enumerated? What are the dangers to the public growing out of this industry that do not apply with equal force to the others? Does the herding or grazing of sheep necessarily, and because of its unwarrantable character, work an injury to the public? And if dangerous in any degree whatever, are the other classes which are omitted and in effect excepted, entirely free from such danger, or do such exceptions tend to reduce the general danger?

We are unable to see that this industry falls within any of the recognized reasons for limitations and discriminations against it? And without some such reason it must be held to be unwarranted and therefore unconstitutional.

In the case of Gulf, Colorado & Sante Fe Ry. Co., vs. Ellis, *supra*, Mr. Justice Brewer said:

> "Classification to relieve a law from the charge of a denial of equal protection can not be made arbitrarily, but must be based upon some difference which bears a just and proper relation to the attempted classification."

III.

Constitutional Provisions Violated.

It follows from what we have said that as the statute is unreasonable and arbitrary and is a discrimination against the owners and herders of sheep, a well established, harmless, industry, it violates not only the 14th Amendment, which guarantees protection to the citizen against the abridg-

ment of his privileges and immunities, but it likewise deprives him of due process of law and denies to him the equal protection of the laws in violation of other provisions of the Constitution.

In the new work of McGehee on Due Process of Law under the Federal Constitution, the author at p. 306 says:

> "A general limitation on the exercise of the Police Power is found in the idea of reasonableness; that is, to be valid, a statute must be reasonable and enacted in good faith (Plessy vs. Ferguson, 163 U. S., 550); for every merely arbitrary and capricious fiat of the Legislature is out of place in 'a government of laws and not of men,' and is irreconcilable with the conception of due process of law.
>
> "As the reasonableness of legislation is a matter preeminently for the consideration of the law-making branch of the government, the court will not examine the question *de novo* and substitute its judgment for that of the legislature, but will pronounce the law void only where it is merely arbitrary or not enacted in good faith."

The author cites a number of decisions of this court in support of the doctrine stated.

Again the same author at p. 345 says:

> "To determine what contracts or what occupations are injurious to public health or morals rests in the legislature exercising the Police Power, and the courts can not interfere with its decision, 'unless looking through mere forms and the substance of the matter, they can say that the statute enacted professedly to protect the public morals (or health) has no real or substantial relation to that object, but is a clear, unmistakable infringement of rights secured by the fundamental law." Citing Booth vs. Ill., 184 U. S., 425.

In the celebrated Laundry case of Yick Wo vs. Hopkins, 118 U. S., 356, Mr. Justice Mathews speaking for the court,

referring to the rights protected by Due Process of Law, quoting the last phrase from the Massachusetts Bill of Rights, said:

> "They are not, therefore, in a strict sense "inalienable," nor was this constitutional clause intended to render them exempt from the control of the state, acting in a legal manner, that is, according to 'Due Process of Law.' The purpose of the provision was to secure the life, liberty and property of the individual from the action of purely personal and arbitrary power, and to place them under the protection of 'a government of laws and not of men.'"

This court in the case of Plessy vs. Ferguson, *supra*, referring to the Police Power said:

> "Every exercise of the Police Power must be reasonable, and extend only to such laws as are enacted in good faith for the promotion of the public good, and not for the annoyance or oppression of a particular class."

It is impossible to conceive of any other purpose for the legislation embraced in the statute under consideration, except that of the "annoyance and oppression" of the class of people in Idaho who owned, herded or grazed sheep. It is also made clear from the decisions of the Supreme Court of Idaho that the statute grew out of conflicts between the cattle and sheep interests in that state. In fact the decisions in the cases at bar were based upon the doctrine of *stare decisis*, the court referring to the decisions of that court in the cases of Seifers vs. Johnson, 65 Pac., 709, and Sweet vs. Ballentine, 69 Pac., 995, wherein the court, two of the judges for and one dissenting, sustained the constitutionality of the act in question. It is thus seen that the Supreme Court of Idaho has always been divided upon the question of the constitutionality of this law.

In the majority opinion of the court in the cases above referred to, in one of which the plaintiff recovered judgment for damages against the defendant for grazing sheep upon the public domain, it was said by the court that there was no statute authorizing the pasturing of stock upon the public lands, but at the same time held that the plaintiff because he held a possessory title to land upon which his house was situated might recover from others damages from pasturing sheep upon any of the public lands within two miles of his house. It is hard to understand upon what theory the plaintiff in such case could recover damages. What right had he, other and different from anyone else to the grasses growing upon the public domain outside of and beyond any claimed title or possession by him? We have seen that under the decision announced by Mr. Justice Miller, in Buford vs. Houtz, 133 U. S., 320, that the United States has not forbidden, but has directly encouraged the pasturage of the public domain by any and all persons, and in the decision announced by Mr. Justice Brown, in the case of Kelly vs. Rhoades, 188 U. S., 1, that Kelly in driving his sheep across the public domain "was at liberty to consider the fact that he was licensed to make use of the public lands of the United States, without charge for the sustenance of his sheep." Fortunately for him he was in Wyoming and not in Idaho, else he would have had to pay damages to someone who had no more right whatever to the use of the grass than he had. The mere statement of this case is sufficient to show that it clearly violates the provisions of the constitution hereinbefore enumerated, and hence should be held to be void.

But if there was any doubt as to the real purpose of this act, an examination of the decisions of the Supreme Court of Idaho, *supra*, sustaining it as a proper exercise of the Police Power, would show what it was. The court held that in fixing the amount of damages to which the householder was entitled it was proper to admit evidence show-

ing what stock he himself had to pasture. In other words, the herder of the sheep who happened to get within the arbitrary limit of two miles of a house would be compelled to pay ten times as much damages to the owner of ten head of cattle, as he would have to pay if he was the owner of but one; and this too, without reference to the amount of grass belonging to the United States his sheep had consumed. Is this due process of law?

Again, in view of this, how can it be held that it is a question of health, comfort, safety or security? It is based wholly upon the proposition that as against all sheep owners or herders, the owner of a house on a possessory claim is entitled to the exclusive right not only to pasture the public domain outside of his claim and for a distance of two miles in every direction, but is in addition entitled to recoved damages from any herder of sheep who invades this area, part of the public domain, it may be, not in proportion to the grass consumed, but in proportion to the stock the householder happens to own. Is this a reasonable exercise of the Police Power? We hardly think so.

It is said the purpose is to encourage settlement of the public lands? But is it for the general welfare and in harmony with the method of disposing of the public lands, to discriminate against an old and well established industry in which large capital has been and is invested; an industry as old as civilization and as harmless as any ever engaged in by man.

This is so clearly class legislation that it is difficult to conceive how it can have the sanction of the courts.

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